

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GARY G. SMITH</b>	:	DETERMINATION DTA NO. 823033
for Revision of a Determination or for Refund of Personal	:	
Income Taxes under Article 22 of the Tax Law and	:	
the Administrative Code of the City of New York for the	:	
Year 2003.	:	

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Petitioner, Gary G. Smith, filed a petition for revision of a determination or for refund of personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2003.

Petitioner, by its representative, Accountancy Lane, Ltd. (Waverly Lane, Jr., EA) brought a motion, dated August 4, 2009, for summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b)(1). Accompanying the motion was the affidavit of Gary G. Smith, dated July 20, 2009, and attached exhibits supporting the motion. On September 3, 2009, the Division of Taxation, appearing by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel), filed a Memorandum in Opposition and annexed exhibits in opposition to petitioner's motion for summary determination and for summary determination in favor of the Division of Taxation. Based upon the motion papers, and all pleadings and proceedings associated with this matter, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed his New York State resident income tax return for 2003 and paid the tax due.

### ***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Gary G. Smith, a Notice of Deficiency, dated February 17, 2009, which asserted that personal income tax was due for the year 2003 in the amount of \$3,063.00 plus penalties and interest for a balance due of \$6,013.53. A previously issued Statement of Audit Changes, dated December 22, 2008, explained that the Division did not have a record of petitioner filing a New York State income tax return for the year 2003. The statement further explained that the Division utilized information obtained from the Internal Revenue Service to determine the amount of tax due. In determining the amount of petitioner's liability, the Division allowed petitioner a credit of \$8.00 for withholding.<sup>1</sup> Petitioner was further advised that the Division would allow additional payments if his withholding from wages or estimated tax payments were greater than the amount allowed by the Division. The penalties were imposed for late filing (Tax Law § 685[a][1]), negligence (Tax Law § 685[b][1]) and negligence or intentional disregard of the Tax Law (Tax Law § 685[b][2]).

2. On April 12, 2009, petitioner's representative faxed an unsigned copy of petitioner's 2003 New York State Resident Income Tax Return, which included a form W-2, which showed total New York State and New York City taxes withheld in the amount of \$2,907.90. After application of the withheld taxes, the return reported a balance due of \$162.00.

3. On May 11, 2009, petitioner filed a petition with the Division of Tax Appeals. According to the petition, an original return was filed but never processed by the Division. Petitioner also asserted that the Division erred in determining the amount of withholding to be

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<sup>1</sup> The credit of \$8.00 was based on information supplied to by the Department of Taxation and Finance's Magnetic Media/Wage Reporting Unit.

credited to petitioner's return. On July 15, 2009, the Division of Tax Appeals received the Division's answer which denied the Division's allegations of fact or error.

4. On August 4, 2009, the petitioner filed this motion for summary determination.<sup>2</sup> In support of his motion, petitioner states that the Division is seeking to "rob" him of nearly \$6,000.00 when nothing is owed; that his 2003 New York State personal income tax return was prepared by a certified public accountant; and that he submitted a timely return and remitted payment therewith by a money order.

5. Following receipt of the unsigned copy of petitioner's 2003 New York State Personal Income Tax Return, the Division performed a further search of the Division's estimated tax files for 2003 in order to ascertain if the amount that Mr. Smith alleged that he paid was placed into an estimated account in error. The Division determined that petitioner did not have an estimated account for 2003 or any other tax year. As a result, the Division has no record of the \$162.00 which is alleged to have been paid.

#### ***SUMMARY OF THE DIVISION'S POSITION***

6. Petitioner maintains that the Form W-2 presents irrefutable evidence and that there is no reason for a hearing. Petitioner also presented an affidavit stating that he filed an income tax return for 2003 and that he paid the amount of tax due by a money order.

7. In its brief, the Division conceded that, on the basis of the form W-2, the Notice of Deficiency should be modified to reflect tax due in the amount of \$162.00 plus penalty and interest. The Division also requests that petitioner's motion be denied and that summary determination be granted in its favor.

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<sup>2</sup> A motion for summary determination was also made prior to this date but was disregarded as premature.

### ***CONCLUSIONS OF LAW***

A. A motion of summary determination will be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

This section also states that a motion for summary determination is subject to the same provision as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

B. It is clear from the motion papers that there are no material issues of fact and that judgment may be granted as a matter of law. First, with respect to the amount of tax in issue, a copy of petitioner’s 2003 New York State personal income tax return shows that, after withholding, there was a balance due to New York State of \$162.00. The Division has accepted this amount as petitioner’s tax liability for the year in issue, and therefore, there is no issue of fact with respect to the amount of the tax liability.

C. Second, the Division asserts that penalty and interest are due because of the failure to timely file and pay the tax due. This position is supported by the fact that the Division does not have any record of receiving petitioner’s tax return for 2003 or a payment of \$162.00. In order to challenge this position, petitioner offered an affidavit stating that he timely filed his return and remitted payment by a money order. He also offered a copy of the return he allegedly filed.

D. In *Matter of Savadjian* (Tax Appeals Tribunal, December 28, 1990), the Tribunal was presented with the issue of whether the taxpayer had filed a return for the year in issue. In

reaching the conclusion that the taxpayer had not sustained his burden of proof, the Tribunal set forth the governing principle as follows:

Where a document has not been received by the Division of Taxation, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Filler*, Tax Appeals Tribunal, August 24, 1989; *Matter of WSD United Transp.*, Tax Appeals Tribunal, July 27, 1989). Therefore, petitioner's testimony that he mailed the 1981 tax return on April 10, 1982 is insufficient to establish that the return was received by the Division of Taxation, absent any proof of certified or registered mailing.

It follows from *Savadjian*, that the affidavit and copy of the unsigned return presented by petitioner is similarly insufficient to prove that petitioner timely filed his personal income tax return for 2003 (*see also Matter of Geller*, Tax Appeals Tribunal, August 20, 1998). Therefore, petitioner has not overcome the presumption of correctness which is borne by a notice of deficiency which is properly issued under the Tax Law (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759 [1980]).

E. Petitioner also argues that he paid the taxes due with a money order. In view of the fact that the Division has no record of receipt of the payment and that petitioner offered no evidence to support his assertion, this contention must also be rejected.

F. Petitioner has not presented any arguments regarding the imposition of penalties and interest. Therefore, these matters are not in issue and will not be considered.

G. The Tribunal's Rules of Practice and Procedure provide that "[w]here it appears that a party, other than the moving party, is entitled to summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion." (20 NYCRR 3000.9[b][1]). Relying upon this section, the Division requests that summary determination be granted in its favor. On the basis of the conclusions reached above, it is found that there are no

material issues of fact and that I may, as a matter of law, issue a determination in favor of the Division. Therefore, the Division's request for summary determination is granted.

H. Petitioner's motion for summary determination is denied; the Notice of Determination, dated February 17, 2009, is modified in accordance with Conclusion of Law B and, except as so modified, is otherwise sustained; the Division of Taxation's request for summary determination is granted and the petition is denied.

DATED: Troy, New York  
December 3, 2009

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE